

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
BellSouth Petition for Declaratory)	WC Docket No. 04-245
Rule and Preemption of)	
State Action)	

**COMMENTS OF GLOBAL CROSSNG
NORTH AMERICA, INC.**

Global Crossing North America, Inc. ("Global Crossing"), pursuant to the Commission's Public Notice,¹ submits these comments in response to BellSouth's petition for declaratory relief.² BellSouth asserts that the Commission possesses the exclusive jurisdiction over the provision, by the Bell Operating Companies ("BOCs"), of those network elements enumerated in section 271 of the Communications Act ("Act") which the BOCs are not also required to provide under section 251 of the Act ("Section 271 Elements").³ BellSouth also requests that the Commission preempt inconsistent state action.⁴

In requesting such relief, BellSouth concedes that the provision of a Section 271 Element: (1) is a Title II service under the Act;⁵ (2) is subject to the just and reasonable and non-discrimination standards contained in section 201 and 202 of the Act;⁶ and (3)

¹ Public Notice, DA 04-2028, *Pleading Cycle Established for Comments on BellSouth's Emergency Petition for Declaratory Ruling and Preemption of State Action*, WC Dkt. 04-245 (July 6, 2004).

² BellSouth Petition for Declaratory Rule and Preemption of State Action (July 1, 2004) ("Petition").

³ Petition, *passim*.

⁴ *Id.* at 11-14.

⁵ *Id.* at 5-6, 11.

⁶ *Id.*, at 8-11.

operates independently of the parallel unbundling requirements contained in section 251 of the Act.⁷

One key element is missing from BellSouth's petition. That is, the provision of Section 271 Elements is *also* subject to the tariffing requirements contained in section 203 of the Act. In ruling on BellSouth's petition, the Commission must necessarily order BellSouth and the other BOCs to file the rates, terms and conditions governing their provision of Section 271 Elements in their federal tariffs.

Section 203 provides:

Every common carrier . . . shall, within such reasonable time as the Commission shall designate, file with the Commission and print and keep open for public inspection schedules showing all charges for itself and its connecting carriers for interstate and foreign wire or radio communication . . . and showing the classifications, practices and regulations affecting such charges.⁸

The Act makes no distinction between the applicability of sections 201, 202 and 203 to Title II services. BellSouth has already conceded that sections 201 and 202 apply to its Section 271 Elements.⁹ Neither it nor the Commission can escape the conclusion that the tariffing requirements of section 203 also apply to such services.¹⁰ To the extent BellSouth is correct that Section 271 Elements are subject to the provisions of Title II of

⁷ *Id.* at 5.

⁸ 47 U.S.C. § 203(a).

⁹ Petition at 8 ("The fact that elements provided pursuant to Section 271 for which there is no finding of impairment are regulated under Sections 201 and 202 *should be uncontroversial.*") (emphasis added); *id.* at 9 ("The Commission *explicitly confirmed* that elements provided pursuant to Section 271 for which there is no impairment finding are regulated under Sections 201 and 202.") (emphasis added).

¹⁰ Section 203 (as well as sections 201 and 202, for that matter) speak in terms of duties imposed with respect to the provision of interstate services. However, there can be no doubt that Section 271 Elements are jurisdictionally interstate services. BellSouth has effectively conceded this. *See id.* at 11 ("The idea of Commission regulation of local telephone service [which, by the way, this is not] under Sections 201 and 202 is neither problematic nor novel.")

the Act, BellSouth cannot pick and choose which Title II obligations apply to it. If sections 201 and 202 are applicable to the provision of Section 271 Elements, section 203 is equally applicable.

Although unstated in BellSouth's petition, it is apparent that BellSouth wishes ardently to avoid public disclosure of any agreements it may reach to provide Section 271 Elements. Such a result, however, would be completely antithetical, not only to section 203, but also to sections 201 and 202 as well. Disclosure of the rates, terms and conditions under which the BOCs provide their Section 271 Elements is absolutely essential if the Commission is to full its oversight obligations provided for in sections 201 and 202. Unless the Commission knows what Section 271 Elements are being provided to which entity and under what terms, the Commission cannot sensibly evaluate whether a BOC is complying with its section 201 and 202 obligations.

Even where the Commission has provided the BOCs (together with other incumbent local exchange carriers) pricing flexibility for certain of their interstate services, it nonetheless required those companies to continue to offer their interstate offerings pursuant to tariff. For example, when the Commission provided certain pricing flexibility with respect to special access and switched transport services, it did not relieve the BOCs of their tariffing obligations.¹¹

In addition, even when the Commission presumptively detariffed the interexchange services offered by non-dominant carriers (which does not include the

¹¹ See *Access Charge Reform*, CC Dkt. 96-262, Fifth Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd. 14221 (1999).

BOCs), it nonetheless required those companies to continue to make public the rates, terms and conditions under which they offered their interstate services.¹²

In addition, underpinning BellSouth's request for preemption of inconsistent state action is its belief that state regulation of Section 271 Elements "has the effect of bringing uncertainty to the regulatory scheme at a time in which certainty in the regulatory landscape is critical and terminating any incentive of carriers to enter into commercial agreements."¹³ Global Crossing can think of no *greater* uncertainty that could be injected into the regulatory landscape than the prospect that the BOCs could enter into secret agreements with favored competitors for which disfavored competitors could obtain no effective relief. If BellSouth wishes its provision of Section 271 Elements to be regulated exclusively by the Commission, then a part of that regulation includes the obligation to tariff and publicly file the rates, terms and conditions under which it offers such services.

Respectfully submitted,

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¹² *Policy and Rules Concerning the Interstate, Interexchange Marketplace*, CC Dkt. 96-61, Second Order on Reconsideration and Erratum, 14 FCC Rcd. 6004 (1999).

¹³ Petition at 1-2.